IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 366 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

AND

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KATHI APABHAI LAKHMANBHAI

Versus

STATE OF GUJARAT

Appearance:

MS SUDHA R GANGWAR for appellant.

Mr. S.T. Mehta, APP for the State.

CORAM : MR.JUSTICE H.R.SHELAT

and

MR.JUSTICE J.R.VORA

Date of decision: 17/02/2000

ORAL JUDGEMENT : (Per: H.R. Shelat, J.)

The appellant was placed on trial in the Court of the Special Judge at Amreli relating to the offence punishable under Section 15 of The Narcotic Drugs & Psychotropic Substances Act, 1985 (for short `the NDPS

Act') and came to be convicted of the same on 31st March 1994 and sentenced to rigorous imprisonment for 10 years and fine of Rs. 1,00,000/-, in default rigorous imprisonment for 2 years more. Being aggrieved by such order of conviction and sentence, the appellant has preferred this appeal.

2. Necessary facts may, in brief, be stated. Harjibhai Parbhatbhai Nandasana was serving as P.S.I. at Vadia police station on 21st August 1991. P.S.I., Shri B.R. Patel and other members of the Prohibition Squad had been to Vadia from Amreli for the purpose of raiding certain places in connection with the offences punishable under Bombay Prohibition Act and Bombay Prevention of Gambling Act. He then came to know that the appellant was keeping fragments of poppy capsules and pieces of poppies in his house without any pass or permit. He therefore informed Harjibhai Parbhatbhai Nandasana, the P.S.I. Consequently, Mr. Nandasana summoned the panchas and apprised them about the purpose and the role they had to play. After the panchas were apprised Mr. Nandasana with the members of the raiding party went to Morvada where the appellant was residing. The appellant's house was then searched in the presence of panchas. From his house a tin was found wherefrom 50 Gms. poppy capsules were found. The same were seized and sealed. A complaint against appellant was lodged and investigation was then taken on hand. At the conclusion of the investigation, chargesheet in the Court of the Special Judge, Amreli was filed which came to be registered as Special Case No. 24 of 1991. The then learned Special Judge framed the charge against the appellant at Ex.5 to which the appellant pleaded not guilty. The prosecution then led necessary evidence. Appreciating the evidence before her, the learned Special Judge found that the prosecution had succeeded in establishing the charge of the offence under Section 15 of the NDPS Act against the appellant. She therefore convicted the appellant thereof and sentenced him as aforesaid. It is against that judgment and order, this appeal is filed calling in question the legality and validity thereof.

3. The learned advocate, representing the appellant and the learned APP, initially advanced the arguments on different points but when we made the query both tapered off their submissions confining to the only contention relating to compliance of Section 41 (2) of the NDPS Act.

4. It is the contention on behalf of the appellant, that soon after the receipt of the information from Shri Bhupendra Ratilal Patel, Shri Harjibhai Parbhatbhai

Nandasana, the then P.S.I. ought to have recorded the information he received and transmitted the same to his higher authorities, but as there is no evidence whatsoever in this regard, noncompliance can be assumed. The prosecution, because of the noncompliance of the requirements of Section 41 (2) of the NDPS Act, cannot succeed and conviction, cannot be maintained. In reply to such contention, Mr. S.T. Mehta, the learned APP has contended that simple non-compliance is of no value. What is to be seen is whether prejudice to the accused is caused because of non-compliance. If the information is not reduced into writing and not sent to the higher-ups the same would not prejudice the accused. Consequently conviction cannot be held to have been vitiated.

5. Section 41 (2) provides that the officer mentioned therein if receives the information regarding the commission of the offence, the same is required to be reduced into writing. If that is not done, what can be the effect has been considered by the Apex Court, in the case of State of Punjab V. Balbir Singh - 1994 S.C.C. (Cri.) 634. It is made clear therein that whenever the officer mentioned in the Section receives the information, the same has to be taken into writing as provided both under Section 41 (2) and 42 (1) of the NDPS Act. Thereafter, discussing regarding the legal aspect thereof, it is observed, that this provision makes it obligatory that such of the officers, mentioned therein, on receiving the information, should reduce the same to writing and also record the reasons for the belief while carrying out the arrest or search as provided under the Proviso to Section 42 (1) of NDPS Act. To that extent the provisions are mandatory. If such mandatory provisions are not complied with, the case of the prosecution would be vitiated and also the trial. As made clear by the Apex Court in this decision, if there is noncompliance of this mandatory provision, the trial must be held vitiated and conviction and sentence cannot be maintained.

6. In the case on hand, we have carefully gone through the entire evidence on record with the assistance of both the learned advocates representing the parties. No where we found any thing indicating compliance of this provision. Bhupendra Ratilal Patel (Ex.17) only testifies to the fact that he, while carrying out the raid in connection with the prohibition and gaming, received the information and the same was transmitted orally to the local P.S.I., Harjibhai Parbhatbhai Nandasana (Ex.21) who thereafter raided the premises and took the search of the house of the appellant. In view

of the aforesaid provision, it was imperative on the part of Harjibhai Parbhatbhai Nandasana to reduce the information into writing, but he is silent on the point while giving evidence before the Court. His shrewd silence reveals that he did not note down in writing the information he received for the purpose of transmitting the same to the higher-ups and thereby he committed the breach of the mandatory provision of Section 41 (2) of the NDPS Act. When that is so, the conviction and sentence inflicted cannot, in view of the aforesaid decision of the Supreme Court, be maintained.

7. For the aforesaid reason, the appeal is required to be allowed. The same is, therefore, allowed. The judgment and order dated 31st March 1994, passed in Special Case No. 24 of 1991 by the then learned Special Judge at Amreli, convicting the appellant of the offence punishable under Section 15 of the NDPS Act, and sentencing him as aforesaid, are hereby quashed and set aside and the appellant is acquitted thereof. He be set at liberty forthwith.

8. At present, the appellant is on bail. The bail bonds executed are cancelled.

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